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Subject: Whether the City of Indian Hills' City Code Chapter 5.20, which regulates estate sales and auctions within the City of Indian Hills, conflicts with KRS 330.200.

Requested by: Kentucky Board of Auctioneers

Written by: Sam Flynn, Assistant Attorney General

Syllabus: The City of Indian Hills' City Code Chapter 5.20 conflicts with KRS Chapter 330 because it impermissibly allows unlicensed, non-exempt residents to conduct auctions, and also regulates licensed auctioneers in a manner prohibited under KRS Chapter 330.

Statutes construed: KRS 330.200, KRS 330.220, KRS 330.230.

Opinion of the Attorney General

The Kentucky Board of Auctioneers ("KBA"), through Counsel, requested an opinion of this office as to whether of Indian Hills' City Code Chapter 5.20 (Ord. 09-01) is in conflict with KRS Chapter 330. City Ordinance 5.20.010 and 5.20.024 impermissibly conflict with KRS 330.200 and are therefore invalid pursuant to KRS 82.082.

The City of Indian Hills ("the City") is a suburban municipality in Jefferson County, Kentucky, operating under the Kentucky "Home Rule" statute. *See* KRS 82.082.¹ On February 19, 2009, the City adopted City Code Chapter 5.20

¹ The Home Rule grant provides:

(Ord. 09-01). The Chapter includes City Ordinance 5.20.024, which provides "Estate Sale Regulations," for the City. Under the Chapter, "Estate Sales "are defined as the following:

An estate sale is a sale or *auction* to dispose of a substantial portion of the household materials in a residence or on a residential property at the time of the sale. An estate sale may be conducted by the owner of or resident of the property, or by a second party who is familiar with the conduct of such disposals, whether compensated or not. *Any sale which involves auctioning of materials is, by definition, an estate sale.* The display of items to be for sale, i.e., for pre-sale inspection, is defined as part of the sale, and must occur within the bounds of the sale permit.

City Ordinance 5.20.010 (emphasis added.)

City Ordinance 5.20.024 expressly limits the location, advertising, supervision of "estate sales." It also requires persons wishing to hold an estate sale to apply for a permit, and further provides the City Mayor the authority to issue to applicants a permit, restricting the time and location of the sale. (*Id.*) City Ordinance 5.20.024 also requires applicants to provide a deposit/fee of \$2,000.00 prior to the issuance of a permit, \$1,500.00 of which is refundable for a one-day estate sale. For two-day sales \$1,000.00 is refundable, assuming the attendees of the sale have not caused any damage to the streets and rights-of-way bordering the sale. (*Id.*) Finally, City Ordinance 5.20.024 requires the City to use the non-refundable portions of the deposit/fee to provide police surveillance, security, and patrolling during the sale, including handling traffic.

Our inquiry here is whether City Code Chapter 5.20 "violates," or is in conflict with the KRS Chapter 330, also known as the Auctioneers License Law of 1962, KRS 330.010 *et seq.* The Chapter regulates auctioneering in the Commonwealth. Among other things, the Chapter provides for the Kentucky Board of

A city may exercise any power and perform any function within its boundaries, including the power of eminent domain in accordance with the provisions of the Eminent Domain Act of Kentucky, that is in furtherance of a public purpose of the city and *not in conflict with a constitutional provision or statute.*

(*See Id.*) (emphasis added.)

Auctioneers, KRS 330.050, and conditions for the issuance of a license, KRS 330.110. The Chapter also regulates auction advertising, KRS 330.230, and proscribes municipalities from regulating, taxing, or licensing state licensed auctioneers. See KRS 330.200.

The former Kentucky Court of Appeals, has stated "It is a fundamental principle that municipal ordinances are inferior in status and subordinate to the laws of the state. An ordinance in conflict with a state law of general character and statewide application is universally held to be invalid." *Boyle v. Campbell, Ky.*, 450 S.W. 2d 265, 268 (1970) (internal citation omitted.) The Supreme Court has recently announced, "[t]he law on this issue is clear." *Ky. Restaurant Ass'n. v. Louisville/Jefferson Co. Metro Gov't.*, 501 S.W.3d 425, 428 (Ky. 2016) (citing KRS 82.082.) Kentucky Revised Statute 82.082 defines a statutory conflict as follows:

A power or function is in conflict with a statute if *it is expressly prohibited by a statute or there is a comprehensive scheme of legislation on the same general subject* embodied in the Kentucky Revised Statutes including but not limited to, the provisions of Chapters 95 and 96.

(Emphasis added.)

The Supreme Court has described the test for such "conflicts" as follows: "a conflict exists between an ordinance and a statute when the ordinance permits conduct which is prohibited by statute or prohibits conduct which is permitted by statute." *Louisville & Nash. R.R. v. Commonwealth, Ky.*, 488 S.W.2d 329, 330 (1972).

City of Indian Hills City Code Chapter 5.20 conflicts with KRS Chapter 330, because it purports to allow non-licensed, non-exempt persons to conduct auctions. Specifically, City Code Chapter 5.20 allows the "resident of [a] property..." to conduct auctions in addition to the owner of the property and auctioneers. However, KRS 330.030 requires auctions be conducted by a licensed auctioneer. Although KRS 330.040 provides certain exceptions to the requirements of KRS 330.030, the "residents of the property" are not included within those exceptions. Because the City Ordinance permits conduct expressly prohibited under both KRS 330.030 and KRS 333.040, the City Ordinance is in conflict with the statute under KRS 82.082, and is therefore invalid.

As noted above, City Ordinance 5.20.024 expressly limits the location, advertising, supervision of "estate sales." City Ordinance 5.20.010 expressly includes any "auction" within the definition of "Estate sales," *Id.* City Ordinance 5.20.010 further regulates who may conduct an estate sale/auction, stating, in part: "[a]n estate sale may be conducted by the *owner of or resident of the property, or by a second party who is familiar with the conduct of such disposals*, whether compensated or not." (emphasis added.) Notably, City Ordinance 5.20.010 allows estate sales to be conducted by the (1) the owner of the property, (2) a resident of the property, or (3) a second party familiar with the conduct of such disposals. *Id.* Read in conjunction, City Ordinances 5.20.024 and 5.20.010 purport to regulate auctions conducted by any of these categories of persons, which would also include licensed auctioneers under KRS 330.030.

City Ordinance 5.20.010 is impermissibly in conflict with KRS Chapter 330, in part, because it allows the resident of a property to conduct an auction. Under KRS 330.030, unlicensed persons may not conduct auctions in the Commonwealth. The language of KRS 330.040 provides certain exceptions to this rule, including allowing the "owner of real or personal property" to conduct auctions without a license. However, those exceptions do not include "the resident of [a] property," as provided under City Ordinance 5.20.010. As the Ordinance allows unlicensed, non-exempt, residents to conduct auctions, which is prohibited under KRS Chapter 330, City Ordinance 5.20.010 impermissibly conflicts with the statute and is invalid.

The next issue raised is whether the City Ordinance conflicts with KRS 330.200.² Chapter 330 expressly prohibits municipalities from regulating licensed auctioneers in such a manner. Specifically, KRS 330.200 provides:

No municipality or other political subdivision shall regulate, tax, or license any licensee except for those administrative regulations, taxes, or licenses which may be reasonably imposed or required among all persons engaged in business generally.

City Ordinance 5.20.024 conflicts with KRS 330.200 because it regulates licensed auctioneers in a manner prohibited under the statute. As discussed above, City Ordinance 5.20.024 regulates auctions within its boundaries, via-City Ordinance 5.20.024's regulation on "Estate Sales," which includes auctions as

² A Westlaw search reveals that neither the Commonwealth's courts nor this Office has previously construed KRS 330.200.

defined under City Ordinance 5.20.010. Among other things, City Ordinance 5.20.024 regulates "Estate Sales," including auctions. City Ordinance 5.20.024 specifically regulates the length of time an auction may occur, limits the area in which an auction may occur, requires a deposit, absolutely prohibits signage advertising, sets presumptions of damage, requires a permit, and sets monetary penalties for violations.

Moreover, City Ordinance 5.20.024 does not meet the exception under the statute because it regulates licensees in a manner not "reasonably imposed or required among all persons engaged in business generally." *See* KRS 330.200. Rather, the City of Indian Hill specifically imposes special limitations and fees on "Estate Sales," and, by extension, auctions, which are levied in addition to those general business regulations found in the City's Code at Chapter 5.04. *See also*, City Ordinance 5.20.024. Accordingly, City Ordinance 5.20.024 is in direct conflict with KRS 330.200, which prohibits such regulations.

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